SUPREME COURT, U. S.

JUL 5 1968

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 266

THE STATE OF FLORIDA and THE UNITED STATES OF AMERICA,
Petitioners,

v.

EMELWON, INC., a Florida Corporation, and KAIEL THOMPSON McALISTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner, The State of Florida, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on February 20, 1968.

OPINION BELOW

The Opinion of the court below (Appendix A) is reported in 391 F. 2d 9.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was filed on February 20, 1968. (Appendix A) A timely Petition for Rehearing filed on March 9, 1968, (Appendix B) was denied on April 2, 1968. (Appendix C) The jurisdiction of this Court is invoked under 28 U.S.C.§1254 (1).

QUESTIONS PRESENTED

1.

Whether liability may arise under the Federal Tort Claims Act upon a theory of absolute liability for the negligence of an independent contractor engaged in aerial spraying operations.

2.

Whether the United States, as the employer of an independent contractor engaged in aerial spraying operations, owes a duty under the Federal Tort Claims Act to the public at large to supervise such operations, discover dangerous situations posing threat of injuries to others, and require precautions to prevent negligence in the accomplishment of the delegated task.

3.

Whether the United States may be liable under the Federal Tort Claims Act as the employer of an independent contractor where the independent contractor is a sovereign state, itself immune from suit in tort.

STATUTE INVOLVED

The statutory provisions involved are 28 U.S.C. §§1346 (b), 2674. (Appendix D)

STATEMENT

In March, 1960, the United States entered into a contract with the State of Florida Game and Fresh Water Fish Commission, a State agency, for the purpose of eradicating water hyacinth and other noxious vegetation in the State of Florida. This contract was authorized under Public Law 85-500, Section 104, of the 85th Congress, July 3, 1958, having to do with eliminating acquatic plant growth from navigable waters, connecting streams and channels.

Pursuant to this contract, the State of Florida was applying an herbicide known as 2,4-d by means of aerial spray. Plaintiffs owned and grew crops upon lands which were within two miles of the aerial application.

By complaint filed in the United States District Court for the Southern District of Florida, plaintiffs sought damages from the United States of America under the Federal Tort Claims Act and alleged damage caused plaintiffs' crops by the negligence in the conducting spraying operations.

Material allegations of the Complaint were denied and the defenses of contributory negligence and assumption of the risk asserted. The United States also filed a third-party complaint against the State of Florida, asserting that the contract between the United States and Florida

contained an indemnity clause providing that the State of Florida would save the United States harmless from "claims that may occur from operations of said program."

At trial, the court directed a verdict in favor of the defendant, United States, at the close of the plaintiffs' case on the ground that the State of Florida was an independent contractor; and, therefore, the United States was not liable for any acts of negligence committed by said contractor. Final Judgment was entered in favor of the United States on July 1, 1965. Plaintiffs filed their Notice of Appeal in the United States Court of Appeals for the Fifth Circuit on August 25, 1965.

In the opinion of that court filed on February 20, 1968, the directed verdict for the United States was reversed on a holding that "jury" questions existed under the law of Florida as to whether employees of the United States negligently breached the duty imposed on an employer who discovers a dangerous situation created by an independent contractor to correct such a situation; and, further, whether employees of the United States negligently breached the non-delegable duty to exercise reasonable care to prevent harm from an inherently dangerous activity.

REASONS FOR GRANTING THE WRIT

1. The decision of the appellate court below imposes upon the United States Government possible liability under the Federal Tort Claims Act upon a theory of absolute liability for the negligence of an independent contractor engaged in aerial spraying operations. While it is recognized in the opinion below that the United States may

not be held liable without fault under the principle stated in *Dalehite v. United States*, 346 U.S.16, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), liability is found possible under the law of Florida, based upon the existence of a "non-delegable duty" where an inherently dangerous activity is carried out by an independent contractor.

The Court goes to great lengths to establish that this is *not* a matter of absolute liability, but rather a matter of negligence on the part of the employer for failure to take reasonable care where inherently dangerous activities are involved. No matter how reasoned, the end result is a theory of absolute liability.

Not only does the opinion below directly conflict with the principles enunciated by this Court in *Dalehite v. United States*, supra, but the importance of the question involved is readily apparent. The opinion is based upon the premise that violation of the non-delegable duty inherent in dangerous activities is itself a negligent act; the negligence involved being not that of the independent contractor, but of the employer. The opinion of the United States Court of Appeals for the Fifth Circuit thus characterizes the non-delegable rule of liability as a rule of actual negligence on the part of the employer.

The "non-delegable rule" of liability invoked in situations involving inherently dangerous activities is nothing more or less than a theory of absolute liability. To characterize it otherwise is a complete abrogation of the principles enunciated in *Dalehite v. United States*, supra, and the cases following which announce that the United States may not be held liable under the Federal Tort Claims Act without fault.

2. The decision below would impose upon the United States, as the employer of an independent contractor, a duty to the public at large to supervise the operations of the independent contractor, to discover situations which pose a danger of injury to others, and to require precautions to prevent negligence in the accomplishment of the delegated task. To impose such duties upon the United States is in direct conflict with the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Page*, 350 F. 2d 28, (10th Cir. 1965). This case clearly enunciates the principle that even in the case of inherently dangerous activities (there, the manufacture of explosives), no duty is violated by a failure to prescribe adequate safety requirements or by a failure to insure that safety regulations are followed by the independent contractor, even where the contract of employment sets forth operational procedures.

Where no such duty is encompassed within the scope of Federal Tort Claims Act, the fact that such a duty may exist under the common law of the State of Florida (where the alleged negligence took place) cannot vary the terms of the Act to create a duty where none is otherwise owed. Just as there is no absolute liability under the Act even though such does exist under the law of many states including the State of Florida, there can be no duty owed which is outside of the scope of the Act, regardless of the law of the place where the alleged negligence takes place.

The importance of the instant question lies in the fact that to impose upon the United States the duty of supervision, inspection and discovery of dangerous situations is to eliminate for all practical purposes the ability of the

United States to contract for the services of an independent contractor to carry forward a designated activity on behalf of the government. To require supervision, control and direction of procedures destroys the very basis of the relationship between employer and independent contractor; that is, control of the means and methods of accomplishment by the contractor with responsibility only for the results obtained.

3. Where the independent contractor is a sovereign state, the question of liability for alleged negligence is clearly unique and of great importance, because it involves the delicate relationship between the sovereignty of the United States and the sovereignty of the State of Florida. By unusual circumstances, the independent contractor here involved is the State of Florida, itself a sovereign entity and entitled to immunity from suit for its torts. The independent contractor here is not liable for negligence in the actual performance of the delegated task, but the employer must, under the holding below, respond in damages under an asserted duty to supervise, discover dangers, and provide precautions to prevent negligence.

While there are no cases which can be found dealing with the precise question here involved, there are cases indicating that the doctrine of charitable immunity from tort liability under the Federal Tort Claims Act would be available to the Federal Government where acts of Federal employees causing the injury fall within the scope of the immunity. *A fortiori*, where the acts of an independent contractor are immune from tort liability under the law of the State where the alleged negligence occurs, the United States should not be liable in an action under the Federal Tort Claims Act for the negligence of its employees arising

under an asserted duty to supervise, direct and control. See, *Porto Rico Gas & Coke Co. v. Frank Rullan & Asso., Inc.*, 189 F.2d 397 (1st Cir.1951); *Grigalauskas v. United States*, 103 F.Supp. 543 (D.C.Mass.1951); aff'd, 195 F.2d 494; *Dishman v. United States*, 93 F.Supp. 567 (D.C.Md. 1950).

CONCLUSION

Because of the conflict of the decision below with other long-standing principles concerning the Federal Tort Claims Act, as well as the importance, the novelty and unique situation here involved, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23045

EMELWON, INC. and KAIEL THOMPSON McALISTER,

Appellants,

versus

UNITED STATES OF AMERICA, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(February 20, 1968.)

Before WISDOM, BELL and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: Appellants sued the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b), claiming damage done to their growing crops by negligent spraying from an airplane of the herbicide 2,4-D to eradicate water hyacinth and other nox-

ious vegetation. At the close of the plaintiff's case the district court directed a verdict for the United States on the ground that the State of Florida, which through its Game and Fresh Water Fish Commission carried out the spraying operations, was neither an agent nor an employee of the United States but was an independent contractor and thus the United States could not be liable under the Tort Claims Act.

We hold that in light of the Florida law it was error to direct a verdict in favor of the United States.

The Tort Claims Act imposes liability on the United States for acts of its employees "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C.A. § 2674,[1] and is to be determined with reference to "the law of the place where the act or omission occurred," 28 U.S.C.A. § 1346(b). See *United States v. Muniz*, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed. 2d 805 (1963); *Richards v. United States*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed. 2d 492 (1962).

It is clear the United States may not be held liable without fault. *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953); *Strangi v. United States*, 211 F.2d 305 (5th Cir. 1954); *Hopson v. United States*, 136 F.Supp. 804 (W.D. Ark. 1956). Nor do the terms of the Act permit the negligence of an independent contractor to be imputed to the United States. See *United States v. Page*, 350 F.2d 28 (10th Cir. 1965). But there is

[1] "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

another possibility—despite the existence of an employer-independent contractor relationship Florida law casts directly upon the employer itself (here the United States) legal duties which its employees may have failed to discharge. Florida recognizes such duties under at least two applicable theories.

First, Florida follows the rule that where an employer gains knowledge of a dangerous situation created by an independent contractor it may incur liability through its failure to halt the operation or otherwise remove the danger. *Maule Indus., Inc. v. Messana*, 62 So. 2d 737 (Fla. 1953); *Breeding's Dania Drug Co. v. Runyon*, 2 So. 2d 376 (Fla. 1941); *Peairs v. Florida Publishing Co.*, 132 So. 2d 561 (Fla. App. 1961).

Second, Florida recognizes the principle that one who employs an independent contractor to engage in certain types of activity has a "nondelegable duty"[2] to see to it that the independent contractor carries out his task in a non-negligent manner. The employer's liability is not absolute, nor is he held vicariously liable for the negligence of the

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[2]The general rule seems to be that an employer who has a "non-delegable duty" is "liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him." *Prosser, Torts* § 70, at 483 (3d ed. 1964), and cases cited there. In Florida, however, the non-delegable duty concept imposes a different burden—the employer is not held absolutely liable but is accountable only for his own negligence.

For instances of situations other than that presented by this case in which Florida has found the employer of an independent contractor to have a nondelegable duty, see National Rating Bureau v. Florida Power Corp., 94 So. 2d 809 (Fla. 1957) (act contracted for is tortious); Easton v. Wier, 125 So. 2d 115 (Fla. App. 1960) (landlord undertaking repairs of building occupied and controlled by tenant).

Here we are concerned only with the Florida rule and express no views as to whether the nondelegable duty rule current in other jurisdictions could be applied against the government in a Tort Claims Act case. Compare *Hopson v. United States*, 136 F. Supp. 804 (W.D. Ark. 1956).

independent contractor. Rather liability is imposed on the employer for his own failure to exercise reasonable care in a situation in which the work is sufficiently dangerous that the employer himself has a duty to third persons who may sustain injuries from the work unless proper precautions are taken in the performance thereof. The taking of such precautions is a duty which the employer may not delegate to his independent contractor so as to evade liability. Should injury occur under such circumstances of sufficiently great danger the employer is liable for the breach of his own "nondelegable duty" to take precautions against harm to third parties. *Florida Power & Light Co. v. Price*, 170 So. 2d 293 (Fla. 1964), articulates the extent of danger required to bring the non-delegable duty into existence as "inherently or intrinsically dangerous work." While the rule is not limited to landlord cases, see *Peairs v. Florida Publishing Co., supra*, it is clearly stated by the Florida Supreme Court in a recent landlord case. *Mai Kai, Inc. v. Collucci*, 205 So. 2d 291 (Fla. 1967):

> The duty to exercise . . . reasonable care is nondelegable in the sense that a contract for its performance by another will not necessarily eliminate an owner's responsibility. The duty, however, remains one of due care or reasonable care in preventing or correcting an unsafe condition, as opposed to absolute liability for a contractor's negligence.

Counsel have pointed us to no Florida cases holding that aerial spraying of herbicides or insecticides is an activity sufficiently dangerous to warrant application of the

Florida nondelegable duty rule. Nor has our own research produced such a Florida case.[3]

In the leading case of *S. A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933), the defendant hired an independent contractor to spray lettuce fields with insecticide from the air. Drifting spray damaged plaintiff's bee colony on nearby property. Plaintiff sued the owner of the lettuce field. The Arizona Supreme Court held:

> The defendant was within its legal rights in depositing the insecticide on its lettuce field for the purpose of ridding it of the worms with which it was infested, and it could do this work itself or it could contract it, but, because of the very great likelihood of the poisonous dust or spray spreading to adjoining or nearby premises and damaging or destroying valuable property thereon, it could not delegate this work to an independent contractor and thus avoid liability.

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[3]Numerous jurisdictions have concluded that aerial spraying of a dangerous chemical which is likely to drift constitutes an inherently dangerous activity for purposes of holding an employer liable for the negligence of an independent contractor. See, *e.g.*, Leonard v. Abbott, 357 S.W. 2d 778 (Tex. Civ. App. 1962); Loe v. Lenhardt, 227 Ore. 242, 362 P.2d 312 (1961); Pendergrass v. Lovelace, 57 N.M. 661, 262 P.2d 231 (1953); Heeb v. Prysock, 219 Ark. 899, 245 S.W.2d 577 (1952); Miles v. A. Arena & Co., 23 Cal. App. 2d 680, 73 P.2d 1260 (1937); S. A. Gerrard Co. v. Fricker, 42 Ariz. 503, 27 P.2d 678 (1933). Spraying 2,4-D from the ground has been held sufficiently dangerous to justify imposition of the nondelegable duty rule. Alexander v. Seaboard Air Line Ry., 221 S.C. 477, 71 S.E.2d 299 (1952); Southwestern Bell Tel. Co. v. Smith, 220 Ark. 223, 247 S.W.2d 16 (1952). See generally, Note, *Liability for Chemical Damage From Aerial Crop Dusting*, 43 Minn. L. Rev. 531 (1959); Note, 6 Stan. L. Rev. 69 (1953). In Godtreaux v. Gary, 232 La. 373, 94 So. 2d 293 (1957), the court relied on the doctrine of strict liability to permit recovery by a farmer whose crops were damaged by the defendant's aerial spraying of 2,4-D. See 32 Tul. L. Rev. 146 (1957).

27 P.2d at 680. We find nothing in the Florida cases to indicate that the courts of that state would adopt a contrary rule.[4]

Respecting the alternative theory of liability—discovery, by the employer of an independent contractor, of a dangerous condition—we find no requirement in the Florida case law that the activity being carried on by the independent contractor must be inherently or intrinsically dangerous. See *Maule Indus., Inc. v. Messana, supra; Breeding's Dania Drug Co. v. Runyon, supra.* It is enough that the employer have knowledge that the independent contractor has created a situation which poses the danger of injury to others.

Under the Tort Claims Act the government is liable "in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U.S.C.A. § 2674. Under the circumstances of this case Florida law would permit the plaintiff to prove that the private employer of an independent contractor failed to exercise reasonable care in a situation in which (a) the activity contracted for was inherently dangerous, or (b) the employer knew that the contractor had created a dangerous condition. By directing a verdict for the government on the ground that the Florida Game and Fresh Water Fish Commission was an independent contractor the district court failed properly to apply the law of Florida to the Tort Claims Act and to the facts of this case.

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[4]Federal statutes which incorporate state substantive law often present questions similar to those raised in diversity cases where the federal court must seek to ascertain how a state court confronted with the particular issue would rule. All too often there is no direct pronouncement by the state courts on the subject. In such instances we must exercise our best judgment to determine that rule which would be applied by the state courts had they, rather than we, been confronted with the problem. See generally, 1A Moore, Federal Practice ¶ 0.309[2] (2d ed. 1965); Wright, Federal Courts § 58 (1963).

Accordingly plaintiff should have been allowed to have the jury decide whether employees of the United States negligently breached the duty imposed on an employer who discovers a dangerous situation created by its independent contractor or the nondelegable duty to exercise reasonable care to prevent harm from an inherently dangerous activity carried out by an independent contractor.[5]

On the record before us it appears that the controlling law is that of Florida. However the parties are not precluded from showing on retrial that the negligent act or omission occurred elsewhere, with the consequences described in *Richards v. United States*, *supra*, at 9-10, 7 L.Ed. 2d at 498.

REVERSED and REMANDED.

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[5]Although we have assumed for purposes of this appeal that the Florida Commission was an independent contractor we do not mean to foreclose this issue in the second trial.

APPENDIX B

(TITLE OMITTED)

PETITION FOR REHEARING

Appellee, The State of Florida, seeks rehearing in this cause from the Court's Opinion of February 20, 1968, upon two grounds:

1. This Court in its Opinion found there to exist a jury issue as to liability of the United States ". . . . despite the existence of an employer-independent contractor relationship . . ." between the United States and the State of Florida. (Opinion of the Court, page 2.) This determination is based upon a finding that ". . . the district court failed properly to apply the law of Florida to the Tort Claims Act and to the facts of this case." (Opinion of the Court, page 7.)

It is respectfully submitted that in so holding this Court failed to consider the uncontradicted line of authority contained in Point II of the State of Florida's Supplemental Memorandum that an independent contractor is not an "employee" under the Federal Tort Claims Act, and not within the scope of the Act, despite state law establishing liability. Thus, whether ". . . plaintiff should have been allowed to have the jury decide whether *employees* of the United States negligently breached . . ." various duties under Florida law is not determinative of the factual issue here presented. (Opinion of the Court, page 7, emphasis supplied.)

2. The Court in its Opinion did not consider that the independent contractor here was the State of Florida, a sovereign entity, which itself is immune from suit for commission of torts by its agents. The immunity of the independent contractor precludes liability on the part of the United States as a matter of law. (Cases cited, Point III, Supplemental Memorandum of the State of Florida.)

Counsel have presented this Petition in good faith and not for the purposes of delay, and the signature below so certifies. It is respectfully requested that this Court reconsider its Opinion of February 20, 1968, and grant rehearing herein.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing petition for Rehearing was this _____ day of March, 1968, served upon Miller, Cone, Owen, Wagner & Nugent, attorneys for Emelwon, Inc.; Kaiel Thompson McAlister, 507 North Olive Avenue, West Palm Beach, Florida; and upon Hon. William A. Meadows, Jr., United States Attorney, Post Office Building, Miami, Florida.

LOUIS M. JEPEWAY

APPENDIX C

(TITLE OMITTED)

Appeal from the United States District Court for the Southern District of Florida

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(Apr. 2, 1968)

Before WISDOM, BELL and GODBOLD, Circuit Judges
PER CURIAM:

The petition for rehearing filed by the State of Florida is DENIED.

APPENDIX D

28 U.S.C. §1346(b) United States as Defendant

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *